Supreme Court, U.S.
FILED
AUG 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-329

RALPH J. SKINKISS,

Appellant,

-against-

OWENS-CORNING FIBERGLAS CORPORATION,

Appellee,

ON APPEAL FROM THE OHIO SUPREME COURT

JURISDICTIONAL STATEMENT

Ralph J. Skinkiss
2954 Shetland Road
Toledo, Ohio 43617

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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

RALPH J. SKINKISS,

Appellant,

-against-

OWENS-CORNING FIBERGLAS, CORP.,

Appellee,

ON APPEAL FROM THE OHIO SUPREME COURT

INTRODUCTION

Appellant appeals to this Court from an order of the Ohio Supreme Court entered on May 10, 1979, denying appellant's request for Rehearing of the Ohio Supreme Court's order of April 12, 1979, dismissing appellant's appeal of right, upon Constitutional issues, to the Ohio Supreme Court from the Lucas County Court of Appeals, Lucas County Ohio, wherein appellant's appeal from a summary judgment in the Lucas County

Court of Common Pleas, was summarily dismissed pursuant to the unconstitutionally vague Ohio Rules of Appellate Procedure and without affording appellant the opportunity to produce argument in defense of such dismissal thereby denying appellant due process and the equal protection of the law as guaranteed by Article I Section 16 of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

OPINION BELOW

No opinions have been entered or reported below.

JURISDICTION

Appellant's cause of action to this Court is based upon Rule 54 (A) of the Ohio Rules of Civil Procedure; Rule 4(A) of the Ohio Appellate Rules, Section 2505.02 of the Ohio Revised Code, Article I Section 5 and Article IV Section 3 (b)(2) of the Ohio Constitution. Appellant appealed to the Lucas County

Court of Appeals, Lucas County Ohio from an order in the Lucas County Court of Common Pleas granting a summary judgment against appellant and subsequent denial of appellant's motion for rehearing of said summary judgment. The Lucas County Court of Appeals dismissed appellant's appeal as not having been timely filed and as constituting an appeal from a non-appealable order and without hearing argument upon the issue by either party. Appellant appealed the Lucas County Court's dismissal of his cause to the Ohio Supreme Court upon Constitutional issues. The Ohio Supreme Court dismissed appellant's appeal as presenting no substantial question by its order of April 12, 1979. Appellant's timely motion for rehearing by the Ohio Supreme Court was further denied by the Ohio Supreme Court's order of May 10, 1979, from which appellant appeals to this Court.

A notice of appeal was filed on July 23, 1979 with the Clerk of the Ohio Supreme Court and with the Clerk of the Lucas County Court of Appeals, Lucas County Ohio. The jurisdiction of this Court to hear this appeal is conferred

by 28 USC 1257 (2) and by Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974).

RULES AND STATUTES INVOLVED

Involved in appellant's appeal to this Court are the following relevant portions of the Ohio Constitution, Ohio Revised Code and Ohio Rules of Appellate Procedure:

Article I, Section Five of the Ohio Constitution provides that:

> "The right of trial by jury shall be inviolate..."

Article IV Section 3 (b)(2) of the Ohio Constitution:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the Courts of record inferior to the Court of Appeals..."

Section 2505.02 of the Ohio Revised Code:

> "An order affecting a substantial right in an action which in effect determines the action and prevents judgment...is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

Rule 4 (A) of the Ohio Appellate Rules:

> "In a civil case the notice of appeal required by Rule 3 shall be filed...within thirty days of the date of the entry of the judgment or order appealed from."

Rule 54 (A) of the Ohio Rules of Civil Procedure:

> "Judgment...includes a decree and any order from which an appeal lies."

QUESTIONS PRESENTED

I. Are the Ohio Rules of Appellate Procedure unconstitutionally vague and indefinite by failing to clearly define appealable issues for which the Courts of Appeal have jurisdiction to hear, modify or reverse and thereby failing to provide for equal protection of the laws and guarantee procedural due process of the law as guaranteed under Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America?

II. Is dismissal for lack of jurisdiction by the Lucas County Court of Appeals of an action wherein appellee had failed to raise such a defense and appellant was not otherwise afforded the opportunity to present argument against such dismissal a denial of procedural due process of law as guaranteed under Article I, Section Sixteen of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States of America?

III. Where plaintiff demands a jury trial as provided under Article I Section Five of the Constitution of Ohio, has the trial Court denied plaintiff due process and equal protection of the laws as guaranteed by Article I Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America when in granting the defendant's motion for summary judgment the trial court makes and enters its finding of disputed fact pursuant to Rule 52 of the Ohio

Rules of Civil Procedure?

IV. Where the Trial Court grants defendant's motion for summary judgment and defendant subsequently moves the court under Rule 52 of the Ohio Rules of Civil Procedure for an entry of findings of fact and conclusions of law and proffers to the court its recommended order modifying the courts earlier decision and the court grants defendant's motion and adopts defendant's recommended order is the final appealable order pursuant to Section 2505.02 of the Ohio Revised Code the later order modified by the Court and adopting defendant's recommended findings of fact and conclusions of law and by not so recognizing such order as final and appealable has the Lucas County Court of Appeals denied appellant due process and the equal protection of the laws guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America?

STATEMENT OF THE CASE

This case arises from a breach of contract action involving an offer of employment by appellee to appellant, a timely acceptance of such offer and detrimental reliance upon the offer by appellant, and the appellee's subsequent repudiation of appellant's acceptance, thereby causing appellant significant damages.

Appellant filed his action for breach of contract and award of damages against appellee on July 11, 1977, in the Lucas County Court of Common Pleas. Subsequent to exchanges of interrogatories by both parties, appellee filed its motion for summary judgment. Appellant, on January 20, 1978, timely filed his opposition to appellant's motion for summary judgment calling to the Court's attention misrepresentations of facts in appellee's brief.

Appellant, on February 13, 1978, moved the court to compel appellee pursuant to Rule 33 (A) of the Ohio Rules of Civil Procedure, to answer interrogatories under oath of the person making them. Appellee failed to timely file

its brief in opposition to appellant's motion.

Judge Pietrykowski, without oral argument, ruled in favor of appellee's motion for summary judgment by his decision dated February 15, 1978.

Judge Pietrykowski's decision was silent with respect to appellant's pending motion to compel appellee to answer interrogatories under oath of the person making them as required under Rule 33 (A).

Appellee on February 20, 1978, moved the Court, under Rule 52 of the Ohio Rules of Civil Procedure, for entry of findings of fact and conclusions of law in regard to the granting of appellee's motion for summary judgment. Appellee's motion for entry of findings of fact presented the same misrepresentations of fact objected to by appellant's brief in opposition to appellee's motion for summary judgment. Appellant timely filed his brief in opposition to appellee's motion for entry of finding of fact by the court, arguing that such an entry was not appropriate under Rule 52 and that appellee's motion called for

the court to make a finding of disputed fact which was improper in a summary judgment.

Appellant, on February 21, 1978, pursuant to Rule 14.11 of the Lucas County Rules, moved the Court for a rehearing of its February 15, 1978 decision arguing that the Courts action deprived appellant the equal protection of the laws of the State of Ohio.

Judge Pietrykowski, on April 17, 1978, entered his "Findings of Fact, Conclusions of Law Judgment Entry" adopting word for word the misstated statement of fact as proffered by the appellee and objected to by appellant. Judge Pietrykowski's judgment entry further dismissed appellant's motion (filed February 13, 1978) to compel appellee to answer interrogatories under the oath of the person making them as required by Rule 33 (A) of the Ohio Rules of Civil Procedure. By separate order, on April 17, 1978, the court also denied appellant's request for rehearing.

Appellant, on May 12, 1978, filed with the Clerk of the Court of Common Pleas, Lucas County, Ohio his notice of appeal to the Lucas County Court of

Appeals of Judge Pietrykowski's February 15, 1978 decision, the April 17, 1978 Findings of Fact, Conclusions of Law, Judgment Entry and the April 17, 1978 denial of appellant's request for rehearing of the February 15, 1978 decision.

Appellant timely filed his appeal brief in the Lucas County Court of Appeals on June 12, 1978. Appellee filed its brief on June 29, 1978 to which appellant filed his reply brief on July 12, 1978.

The Lucas County Court of Appeals set December 28, 1978 for oral argument, however, on December 22, 1978 the Court of Appeals dismissed appellant's appeal for failure of appellant to file a timely notice of appeal from Judge Pietrykowski's decision of February 15, 1978.

Pursuant to Rule 26 of the Ohio Appellate Rules, appellant, on January 3, 1979, timely filed his request for reconsideration of the Court's dismissal arguing that such dismissal without argument therefore by appellee and without affording appellant the opportunity to present his defense in opposition to such dismissal denied appellant due

process and the equal protection of the law as guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States. Appellee filed its motion to strike and memorandum opposing appellant's application for reconsideration of January 9, 1979. The Lucas County Court of Appeals, on January 11, 1979, denied appellant's motion for reconsideration and ruled appellee's motion to strike moot.

Appellant timely filed his notice of appeal to the Ohio Supreme Court with the Clerk of the Lucas County Court of Appeals on January 19, 1979. Appellant timely filed his memorandum in support of the appeal with the Clerk of the Ohio Supreme Court on February 20, 1979, arguing inter alia the unconstitutionality of the Ohio Rules of Appellate Procedure and Section 2505.02 of the Ohio Revised Code as being indefinite and vague. Appellee, on March 10, 1979, filed its memorandum opposing jurisdiction.

The Ohio Supreme Court, on April 12, 1979 without oral argument, dismissed appellant's appeal to which appellant on

April 23, 1979, pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio, timely filed his motion for reconsideration to which appellee filed its opposition to appellant's motion. Appellant's motion was denied by the Ohio Supreme Court by its order of May 10, 1979.

Upon the above record and without having had a single oral argument below this cause comes before this Honorable Court.

THE QUESTIONS ARE SUBSTANTIAL

Appellate jurisdiction is granted by the Ohio Constitution, Article IV, Section 3 (b)(2) by providing:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the Courts of record inferior to the Court of Appeals..." (emphasis added)

Thus the Ohio Constitution grants power to the Appellate Courts to review "judgments or final orders."

Section 2505.02 of the Ohio Revised Code defines "final order" as:

> "An order affecting a sub-

stantial right in an action which in effect <u>determines the action and prevents judgment ...is a final order</u> which may be reviewed, affirmed, modified, or reversed, with or without retrial."
(emphasis added)

Rule 54 (A) of the Ohio Rules of Civil Procedure defines judgment as:

"Judgment as used in these rules includes a decree and <u>any order</u> from which an appeal lies."
(emphasis added)

Thus Appellate jurisdiction applies only to reviewing of "judgments" or "final orders." A "final order" is defined as an order which "prevents judgment." However, "judgment" is defined as "any order from which an appeal lies." Thus one must first know what is appealable before one can identify a judgment; and one must know what a judgment is before one can identify a final order.

Considering the question from another view point: A final order (which is appealable) is one which prevents a judgment. A judgment is any order from which an appeal lies. Therefore, combining the two definitions, a "final

order" is an order preventing any order from which an appeal lies.

Thus the Ohio Appellate Rules are vague and indefinite as no clear definition exists as to what constitutes a judgment or final order and is thus appealable.

Confusing the issue further is Ohio Appellate Rule 4 (A) which provides:

"In a civil case the notice of appeal... shall be filed...within thirty days of the date of the entry of the <u>judgment or order</u> appealed from."
(emphasis added)

Since a "judgment" and a "final order" are indefinite one is left to guess just what is the appealable order from which he must file his notice of appeal. And his guess must be consistant with the mind of the Appellate Court as to what in their opinion the Appealable order was.

It is a general principle that a statute or rule which requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. <u>Cramp v</u>.

Board of Public Instruction, 368 U.S.278; United States v. Spector, 343 U.S. 169; United States v. Petrillo, 332 U.S. 1; United States v. Darby, 312 U.S. 100; Pearson v. Probate Ct., 309 U.S. 270; Kay v. United States, 303 U.S. 1.
This Honorable Court has held that a non-criminal statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning. Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 81; Neblett v. Carpenter, 305 U.S. 297; Keyishian v. Board of Regents, 385 U.S. 589.

Appellant was not the only one confused respecting the appealable order in the case at bar. Appellee also believed the April 17, 1978 "Judgment Entry" to be in fact the final and appealable order as appellee offered no argument or challenge to the timeliness of appellant's notice of appeal nor the Appellate Court's jurisdiction to hear the appeal.

A state may prescribe rules as to appellate procedure. However, a party otherwise entitled to appeal who, by the construction of a statute or rule, is prevented from doing so where such right

is given to all others in similar cases, is thus deprived of the right of due process of law. State ex. rel. J. Hahn Bakery Co. v. Anderson, 269 Mo. 381, 190 S.W. 857. A state may regulate the procedure of its courts in accordance with its own conception of fairness unless it offends some principle of justice held to be fundamental. Among such fundamentals is the requirement of notice and hearing. Hooker v. Los Angeles, 188 U.S. 314; Rogers v. Peck, 199 U.S. 425; People's Wayne County Bank v. Wolverine Box Co., 230 N.W. 170.

The citations are endless for the principle that procedural due process requires that one against whom it is sought to deprive of a legal right must be given notice of that fact and must be given an opportunity to offer his defense to such deprivation. It is a rule as old as law itself that no one shall be personally deprived of his legal rights until he has had his day in court, namely that he be afforded an opportunity to be heard. Judgment without such opportunity lacks all attributes of a judicial determination; it is judicial usurpation and oppression and

can never be upheld where justice is fairly administered. Snyder v. Massachusetts, 291 U.S. 97; Powell v. United States, 287 U.S. 45; Blackmer v. United States, 284 U.S. 421; Hardware Dealers Mut. Fund Ins. Co. v. Glidden Co., 284 U.S. 151; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673. Couched in the language of procedural due process is the proposition that due process of law generally implies and includes an opportunity to answer and a trial according to a settled course of judicial proceedings. King v. Panther Lumber Co., 171 U.S. 437; King v. Mullins, 171 U.S. 404; Anderson National Bank v. Luckett, 321 U.S. 233. There can be no doubt that all of the above cited precedents plus an endless number of state decisions require, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306.

In the case at bar the question of lack of jurisdiction for failure to timely file a notice of appeal had not been raised before the Lucas County

Court of Appeals by the appellee in its appeal brief. The Court's dismissal of appellant's appeal upon this ground and without affording appellant an opportunity to be heard was arbitrary without precedent and an usurpation of appellant's procedural rights as guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States.

Appellant pursuant to Ohio Appellate Rule 26, timely filed his request for reconsideration to the Lucas County Court of Appeals upon the grounds that appellant was deprived due process of law by the Courts summary dismissal of appellant's action. The court denied appellant's request.

Appellant has been denied procedural due process in violation of the guarantees provided under the Ohio Constitution and the Constitution of the United States by the Appellate Court's refusal to grant appellant the opportunity to present arguments against dismissal for lack of jurisdiction.

The Ohio Appellate procedure with respect to the question of what consti-

tutes a final appealable order has long been confusingly vague. It has been proposed that the question to be answered in determining whether a final appealable order has been rendered in Ohio is: "Can I win my case in this Court, and have the same opportunity which I believe is coming to me regardless of this particular decision against me?" What is a Final Order in Ohio, 19 Cin. L. Rev. 522. If the above question is answered in the affirmative it is advised that the order being tested for finality is not final and therefore not appealable; if answered in the negative, the order is final and appealable. Reasonable minds can differ as to the answer to this question when applied to a given set of facts.

Article I, Section Five of the Ohio Constitution provides that:

> "The right to trial by jury shall be inviolate..."

It has been held in Ohio that the right to a jury trial is a substantial right and does not involve merely a question of procedure, Ry v. Halliday, 127 O.S. 278.

Appellant in his action before the

Lucas County Court of Common Pleas, on August 23, 1977, timely demanded a trial by jury pursuant to Rule 38 (B) of the Ohio Rules of Civil Procedure. The trial court violated appellant's right to have a jury determine the issues of fact in dispute between the parties by entering its finding of disputed fact pursuant to appellee's motion under Rule 52 of the Ohio Rules of Civil Procedure which only provide for determination of fact when questions of fact are tried to the court without a jury. Such finding of disputed fact was entered by the Lucas County Court of Common Pleas by its order dated April 17, 1978, two full months after its February 15, 1978 order granting appellee's motion for summary judgment.

If appellant had been required to file his notice of appeal within thirty days of Judge Pietrykowski's February 15, 1978 decision it would have been necessary to file such notice on or before March 17, 1978 or at least thirty one (31) days prior to Judge Pietrykowski's order of April 17, 1978. At this date (March 17, 1978) appellant could not be aware of all issues or questions to be

appealed because of the motions then pending before the Court.

Allowing seven (7) days for the Clerk of Lucas County Court of Common Pleas to file the trial court record in the Court of Appeals (as was the case in the present action) the appellant would have been required to file his appeal brief on or before April 13, 1978, (twenty days after transfer of the record to the Court of Appeals pursuant to Rule 18 (A) of the Ohio Rules of Appellate Procedure) or at least four (4) days prior to Judge Pietrykowski's final order of April 17, 1978.

Thus if appellant had been required to file his notice of appeal within (30) thirty days of Judge Pietrykowski's February 15, 1978 decision appellant would have been required to file his appeal brief at least four (4) days in advance of having full knowledge of all assignments of error and four (4) days before the courts denial of his motion for rehearing.

The trial court abused its descretion by not advising appellant of its ruling on appellee's motion for findings of fact and conclusions and appellant's

timely filed motion for rehearing for a period of two months.

Section 2505.02 of the Ohio Revised Code has been held to define a final order as one which affects a substantial right in an action and in effect determines the action and prevents possibility of any further proceedings by the court respecting the merits of the cause. Jolley v. Martin Brothers Box Co., 158 O.S. 416; Roof v. National Surety Corp., 92 App. 295. A decree has been held to be final only when it disposes of all issues and leaves nothing further within the jurisdiction of the court for its further consideration or decision. Kelly v. Stanberg, 13 O. 408; Teaff v. Hewitt, 1 O.S. 511; Cincinnati S. & C.R. Co. v. Sloan, 31 O.S. 1.

Thus an order has been held not final or appealable until it is in fact final and there remains no possibility for the court to further review or consider the merits of the action before it. National Surety Corp. v. Blackburn, 58 O.L. Abs. 193.

In the case at bar appellant, pursuant to Rule 14.11 of the Lucas County Court Rules, timely filed his motion for

rehearing of Judge Pietrykowski's February 15, 1978 decision granting appellee's motion for summary judgment. Thus by appellant's motion the court retained jurisdiction of the cause and possessed the power to vacate Judge Pietrykowski's February 15, 1978 decision. Therefore, the February 15, 1978 decision was not a final order and not appealable pursuant to judicial definitions of a final order under RC 2505.02.

The final and appealable order in the case at bar was the court's denial of appellant's motion for rehearing on April 17, 1978, as until that order was entered, a possibility existed that the court might grant said rehearing and upon such vacate or reverse its decision of February 15, 1978. The cause of action was not, in fact, finally decided by the Lucas County Court of Common Pleas until appellant was denied his motion for rehearing. National Surety Corp. v. Blackburn, supra; Cox v. Cox, 104 O.S. 611.

Thus both the Lucas County Court of Common Pleas and the Lucas County Court of Appeals have denied appellant due process and the equal protection of the

laws of the State of Ohio.

In summary the Lucas County Court of Common Pleas erred by deciding issues of disputed facts and granting appellee's motion for summary judgment thereby depriving appellant due process and the equal protection of the laws of the State of Ohio. The Lucas County Court of Appeals, by dismissing appellant's appeal from the Lucas County Court of Common Pleas, further denied appellant his right to due process and the equal protection of the laws of the State of Ohio. Consequently the questions presented by this case are substantial and appellant urges this Court to note probable jurisdiction and set the Cause for oral argument, or, in the alternative, summarily reverse the decisions below and remand this Cause for trial on the merits to the Lucas County Court of Common Pleas.

Dated: Toledo, Ohio
August 1, 1979

Respectfully Submitted,

SS

Ralph J. Skinkiss
2954 Shetland Road
Toledo, Ohio 43617
(419) 841-2158

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Jurisdictional Statement and Motion for Summary Reversal was served upon John G. Mattimoe Esq., attorney for Appellee below, by mailing a copy to him by first-class mail, postage paid on this_____day of August 1979.

Ralph J. Skinkiss

Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 79-329

RALPH J. SKINKISS,

Appellant,

-against-

OWENS-CORNING FIBERGLAS, CORP.,

Appellee,

ON APPEAL FROM THE OHIO SUPREME COURT

JURISDICTIONAL STATEMENT

APPENDIX

Ralph J. Skinkiss
2954 Shetland Road
Toledo, Ohio 43617

IN THE SUPREME COURT
OF OHIO

Ralph J. Skinkiss, Appellant,	)	Cause No: 79-227
v.	)	
Owens-Corning Fiberglas Corp., Appellee,	)	NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Ralph J. Skinkiss, Appellant pursuant to Title 28 of the United States Code, Section 1257 (2) hereby appeals to the United States Supreme Court from the decision entered in this cause on the 12th. day of April 1979 by the Ohio Supreme Court dismissing Appellant's appeal of right from the Lucas County Court of Appeals and the decision entered in this Court on the 10th. day of May 1979 denying Appellant's Motion for Rehearing.

ss
Ralph J. Skinkiss

IN THE COURT OF APPEALS
OF LUCAS COUNTY

Ralph J. Skinkiss, Appellant,	)	Cause No: L-78-105
v.	)	
Owens-Corning Fiberglas Corp., Appellee,	)	NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Ralph J. Skinkiss, Appellant pursuant to Title 28 of the United States Code, Section 1257 (2) hereby appeals to the United States Supreme Court from the decision entered in this cause on the 12th. day of April 1979 by the Ohio Supreme Court dismissing Appellant's appeal of right from the Lucas County Court of Appeals and the decision entered in this Court on the 10th. day of May denying Appellant's Motion for Rehearing.

ss
Ralph J. Skinkiss

THE SUPREME COURT OF OHIO

Ralph J. Skinkiss, Appellant,	)	1979 term
	)	To wit: Apr. 12, 1979
v.	)	
Owen-Corning Fiberglas Corp., Appellee,	)	No. 79-227
	)	APPEAL FROM THE COURT OF APPEALS
	)	for...Lucas...Co.

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this.....day of..... 19.....

.....Clerk

.....Deputy

THE SUPREME COURT OF THE STATE OF OHIO

Ralph J. Skinkiss, Appellant,	)	1979 term
	)	To wit: May 10, 1979
v.	)	No. 79-227
Owens-Corning Fiberglas Corp., Appellee,	)	REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, Thomas L. Startzman, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page...

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 10th. day of May 1979

..Thomas L. Startzman..Clerk

IN THE COURT OF APPEALS OF LUCAS COUNTY

Ralph J. Skinkiss Appellant,	Court of Appeals No. L-78-105
v.	Trial Court No. CV77-1345
Owens-Corning Fiberglas Corp., Appellee,	DECISION AND JOURNAL ENTRY

Date: Dec. 22, 1978

For the following reasons, the appeal in this case is hereby dismissed for failure to file a timely notice of appeal from the final judgment of February 16, 1978, at appellant's costs.

The notice of appeal herein, filed on May 12, 1978, states that the appeal is from "the (trial) Court's decision of February 15, 1978 (actually filed on February 16, 1978), dismissing plaintiff's action; the Court's decision filed***April 17, 1978, overruling plaintiff's Motion for a rehearing of the Court's decision of February 15, 1978; and the Court's Finding of Fact, Conclusions of Law and Judgment Entry, entered in this action on April 17, 1978."
The final appealable judgment in this case is that entered on Feb. 16, 1978.

The April 17th. order denying the motion for rehearing is not an appealable order. In Re Estate of Bancroft (App. 1959), 82 Ohio Law Abs. 577.

The findings and conclusions in the April 17th. Judgment Entry do no constitute an appealable order. The final paragraph of that entry, to wit:

1.

"It is, therefore, ORDERED and ADJUDGED:

"1. That Defendant Owens-Corning Fiberglas Corporation's Motion for Summary Judgment is in all respects granted; and

"2. That the Complaint is hereby dismissed with prejudice, at plaintiff's costs."

is a reaffirmation of the judgment of February 16; it is not a new appealable judgment, and it does not extend the time for filing an appeal from the February 16 judgment. 4 Ohio Jur. 3d. Appellate Review, Sec. 210

As appellant filed his notice of appeal on May 12, 1978, from a judgment entered on February 16, 1978, the notice was not timely under App. R. 4. and this court has no jurisdiction to hear the

appeal.

Cause remanded to the Lucas County Common Pleas Court for execution for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be filestamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run.
App. R. 22 (E).

John W. Potter, P.J. ss
PRESIDING JUDGE

Clifford F. Brown, J. ss
JUDGE

John J.Connors, Jr., J.
concur.

ss
JUDGE

2.

IN THE COURT OF APPEALS OF LUCAS COUNTY

Ralph J. Skinkiss
Appellant,

v.

Owens-Corning
Fiberglas Corp.,
Appellee,

Date: Jan. 11, 1979

Court of Appeals
No. L-78-105

Trial Court
No. CV77-1345

DECISION AND
JOURNAL ENTRY

This cause came to be heard on appellant's motion for reconsideration and appellee's motion to strike appellant's motion. Adhering to our former decision, appellant's motion to reconsider is denied. Appellee's motion to strike is denied as moot.

John W. Potter, P.J. ss
Presiding Judge

Clifford F. Brown, J. ss
Judge

John J. Connors, Jr., J.
concur.

ss
Judge

IN THE COMMON PLEAS COURT
OF
LUCAS COUNTY OHIO

Ralph J. Skinkiss,

Plaintiff,

v. 77-1345

Owens-Corning
Fiberglas Corp.,

Defendant,

This day defendant's motion for summary judgment came on for hearing. Counsel having agreed that no oral arguments were necessary and the court being fully advised in the premises and upon the pleadings, briefs, responses and interrogatories finds pursuant to Rule 56 of the Ohio Rules of Civil Procedure that this case is appropriate for summary judgment since it is clear from the pleadings that there is no genuine dispute as to any material fact. The court further finds that defendant's motion for summary judgment as a matter of law is well taken and hereby grants the same.

In accordance with this finding the court hereby dismisses the claims of the plaintiff as a matter of law. Plaintiff's cause is hereby dismissed with prejudice with plaintiff to pay the costs.

2-15-78
Date

ss
Judge Pietrykowski

IN THE COURT OF COMMON PLEAS
OF
LUCAS COUNTY OHIO

Ralph J. Skinkiss Plaintiff, v. Owens-Corning Fiberglas Corp., Defendant,	)	Case No. 77-1345 MOTION UNDER RULE 52

Now comes the defendant Owens-Corning Fiberglas Corporation and pursuant to Rule 52, Ohio Rules of Civil Procedure, moves the Court for the entry of findings of fact and conclusions of law in regard to its granting of the defendant's motion for summary judgment. Attached is the Judgment Entry containing findings of fact and conclusions of law which the defendant would propose to have the Court enter.

Respectfully Submitted,

ss
John G. Mattimoe

IN THE COURT OF COMMON PLEAS
OF
LUCAS COUNTY OHIO

Ralph J. Skinkiss, Plaintiff, v. Owens-Corning Fiberglas Corp. Defendant,	)	Case No. 77-1345 JUDGMENT ENTRY

Defendant's Motion for Summary Judgment came on for hearing February 3, 1978, and by agreement of the parties was submitted to the Court on the motion briefs, the pleadings, on defendant's Answers to Plaintiff's First and Second Sets of Interrogatories, and on Plaintiff's Answer to Defendant's First Set of Interrogatories, the parties having waived oral argument on said motion and the filing of affidavits with respect thereto.

Upon consideration, the Court finds, holds and orders as follows:

During the period from December 6, 1971 to March 31, 1977 plaintiff was employed by defendant as house patent counsel. Plaintiff alleges that, during December, 1976, a new contract of employment was entered into by the parties as a result of defendant's offering plaintiff a salary increase and agreeing to certain organizational changes to be made for plaintiff's benefit, in consideration of plaintiff's continuing employment. Although disputing this allegation, the defendant has admitted it for the purposes of the motion and the Court has assumed it to be true. Plaintiff's claim is that his employment under the alleged new contract was terminated effective March 31, 1977, without cause.

It appears, however, that the new contract of employment, as claimed by plaintiff, was not for any specific or definite term. Upon being asked, in defendant's Interrogatory No. 11 (d):

> "For what term, or period of time did Mr. Bretz (defendant's representative) propose that you agree to continue your employment with

> Owens-Corning Fiberglas Corporation, as consideration for the salary increase and certain organizational changes which you claim he offered?"

Plaintiff responded:

> "ANSWER, No period of time was discussed."

In the absence of facts and circumstances which indicate that it is for a specific term, an employment contract which makes no provision as to the duration of the employment is terminable at will by either party, Henckel v. Educational Research Counsel, 45 Ohio St. 2d 249, 344 N.E. 2d 118 (1976). Indeed, in his own brief plaintiff appears to concede that such employment contracts of indefinite duration "may be terminated by the parties at any time," (plaintiff's Response to Defendant's Motion for Summary Judgment, 3).

Accordingly, the Court finds and holds that there is no genuine issue of material fact, that defendant is entitled to judgment as a matter of law, and that defendant's Motion for Summary Judgment is well taken.

Subsequent to the submission of this matter to the Court on defendant's Motion for Summary Judgment, the plaintiff moved to compel the defendant to answer plaintiff's interrogatories under the oath of the person making them. The Court finds that a ruling on this motion is unnecessary since, for the purposes of summary judgment, the Court considered the responses to be binding on the defendant corporation regardless of who provided the information or signed the interrogatories.

It is therefore, ORDERED and ADJUDGED:

1. That defendant Owens-Corning Fiberglas Corporation's Motion for Summary Judgment is in all respects granted; and

2. That the Complaint is hereby dismissed with prejudice, at plaintiff's costs.

_____
Judge

APPROVED:

_____
Attorney for Plaintiff

ss

_____
Attorney for Defendant

IN THE COURT OF COMMON PLEAS
OF
LUCAS COUNTY OHIO

Ralph J. Skinkiss, — No. 77-1345

Plaintiff,

v.

Owens-Corning Fiberglas Corp.,

Defendant,

FINDINGS OF FACT, CONCLUSIONS OF LAW JUDGMENT ENTRY

Defendant's Motion for Summary judgment came on for hearing on February 3, 1978, and by agreement of the parties was submitted to the Court on the motion briefs, the pleadings, on Defendant's Answers to Plaintiff's First and Second Sets of Interrogatories, and on Plaintiff's Answer to Defendant's First Set of Interrogatories, the parties having waived oral argument on said motion and the filing of affidavits with respect thereto.

Upon consideration, the Court finds, holds and orders as follows:

During the period from December 6, 1971 to March 31, 1977, Plaintiff was employed by Defendant as house patent

counsel. Plaintiff alleges that, during December 1976, a new contract of employment was entered into by the parties as a result of Defendant's offering Plaintiff a salary increase and agreeing to certain organizational changes to be made for Plaintiff's benefit, in consideration of Plaintiff's continuing employment. Although disputing this allegation, the Defendant has admitted it for the purposes of the motion and the Court has assumed it to be true. Plaintiff's claim is that his employment under the alleged new contract was terminated effective March 31, 1977, without cause.

It appears, however, that the new contract of employment, as claimed by Plaintiff, was not for any specific or definite term. Upon being asked, in Defendant's Interrogatory No. 11 (d):

> "For what term, or period of time did Mr. Bretz (defendant's representative) propose that you agree to continue your employment with Owens-Corning Fiberglas Corporation, as consideration for the salary increase and certain organizational changes which you claim he offered?"

Plaintiff responded:

> "ANSWER. No period of time was discussed."

In the absence of facts and circumstances which indicate that it is for a specific term, an employment contract is terminable at will by either party Henckel v. Educational Research Counsel, 45 Ohio St. 2d 249, 344 N.E. 2d 118 (1976). Indeed, in his own brief Plaintiff appears to concede that such employment contracts of indefinite duration "may be terminated by the parties at any time," (Plaintiff's Response to Defendant's Motion for Summary Judgment, 3).

Accordingly, the Court finds and holds that there is no genuine issue of material fact, that Defendant is entitled to judgment as a matter of law, and that Defendant's Motion for Summary Judgment is well taken.

Subsequent to the submission of this matter to the Court on Defendant's Motion for Summary Judgment, the Plaintiff moved to compel the Defendant to answer Plaintiff's Interrogatories under the oath of the person making them. The Court finds that a ruling on this motion is unnecessary since, for the purposes

of summary judgment, the Court considered the responses to be binding on the Defendant corporation regardless of who provided the information or signed the interrogatories.

It is therefore, ORDERED and ADJUDGED:

1. That Defendant Owens-Corning Fiberglas Corporation's Motion for Summary Judgment is in all respects granted; and

2. That the Complaint is hereby dismissed with prejudice, at Plaintiff's costs.

ss

Judge

IN THE COURT OF COMMON PLEAS
OF
LUCAS COUNTY OHIO

Ralph J. Skinkiss

Plaintiff,

v. 77-1345

ORDER

Owens-Corning
Fiberglas Corporation

Defendant,

This day plaintiff's motion for rehearing came on for hearing. The Court being fully advised in the premises reaffirms its prior decision finding defendant's motion for summary judgment well taken.

It is therefore ordered and adjudged that plaintiff's motion for rehearing is not well taken and is hereby overuled.

ss

Judge Francis A. Pietrykowski

THE
OHIO REVISED CODE

Section 2505.02 Final Order

An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

When a court makes such an order granting a new trial, setting aside or vacating a judgment, the court upon the request of either party, shall state in the order the grounds upon which the new trial is granted and the judgment vacated or set aside.

RULES OF PRACTICE OF
THE SUPREME COURT OF OHIO

RULE IX. MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

Section 1. Motion for rehearing

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

OHIO RULES
OF
APPELLATE PROCEDURE

RULE 4. Appeal as of right--when taken

(A) Appeals in civil case. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision com-

Rule 18 Filing and Service of Briefs

The appellant shall serve and file his brief within twenty days after the date on which the record is filed. The appellee shall serve and file his brief within twenty days after service of the brief of appellant. The appellant may serve and file a reply brief within ten days after service of the brief of the appellee.

RULE 26. Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration does not extend the time for filing a notice of appeal in a court of appeals.

Parties opposing the application must answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served as prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

OHIO RULES

OF

CIVIL PROCEDURE

RULE 33
INTERROGATORIES TO PARTIES

(A) Availability; procedures for use.

Any party may serve any other party written interrogatories to be answered by the party served. If the party served is a public or private corporation or a partnership or association, the organization shall choose one or more of its proper employees, officers or agents to answer the interrogatories, and the employee, officer or agent shall furnish such information as is known or available to the organization. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which

event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories not less than twenty-eight days after the service thereof or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Rule 37 with respect to any objection to or other failure to answer an interrogatory.

OHIO RULES

OF

CIVIL PROCEDURE

RULE 38
JURY TRIAL OF RIGHT

(A) Right preserved.

The right to trial by jury shall be preserved to the parties inviolate.

(B) Demand.

Any party may demand a trial on any issue triable of right by a jury by serving upon the other parties a damand therefor in writing at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue.

OHIO RULES

OF

CIVIL PROCEDURE

RULE 52
FINDINGS BY THE COURT

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing or orally in open court requests otherwise before the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk of the court for journalization, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions

of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

Findings of fact and conclusions of law required by this rule and by Rule 41 (B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.

An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41 (B)(2).

RULE 54
JUDGMENTS; COSTS

(A) Definition; Form.

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a referee or the record of prior proceedings.

RULES OF PRACTICE
COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

Rule 14.11 - Motions for rehearings of rulings on motions must be filed within three days after rulings are made.

CONSTITUTION
OF THE
UNITED STATES OF AMERICA
AMENDMENT FOURTEEN

Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OHIO

Article I Section 5

Trial By Jury

The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

CONSTITUTION OF OHIO

Article I Section 16

Redress in Courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

CONSTITUTION OF OHIO

Article IV Section 3 (b)(2)

APPELLATE COURT

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify or reverse final orders or actions of administrative officers or agencies.

Supreme Court, U.S.
FILED
SEP 15 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 79-329

RALPH J. SKINKISS,
Appellant,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

JOHN G. MATTIMOE
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Supreme Court of the United States

October Term, 1978

No. 79-329

RALPH J. SKINKISS,
Appellant,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

The Appellee respectfully moves the Court to dismiss the appeal herein, on the grounds that it does not present a substantial federal question; that the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on; and that the judgment below rests on adequate state grounds.

QUESTION PRESENTED

Whether Rule 4(A), Ohio Rules of Appellate Procedure, which requires that a notice of appeal be filed "within thirty days of the date of the entry of the judgment or order appealed from," is so vague and indefinite as to violate the Due Process or Equal Protection clauses of the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellant Ralph Skinkiss, a patent attorney, brought this action in the Court of Common Pleas of Lucas County, Ohio against his former employer, appellee Owens-Corning Fiberglas Corporation ("Owens-Corning"), claiming that he was wrongfully discharged in breach of an alleged employment contract.

1. Proceedings in the Trial Court

After discovery Owens-Corning moved for summary judgment, which the trial court granted by an entry which concluded by stating that "Plaintiff's cause is hereby dismissed with prejudice with plaintiff to pay the costs."[1] This entry, which we will call the "February 16th entry," was duly filed on that date with the clerk of the court for journalization.[2]

Owens-Corning then moved the trial court for findings of fact and conclusions of law, and appellant moved for rehearing. Neither motion would have served to interrupt

1. Order of the Court of Common Pleas dated February 15, 1978, filed February 16, 1978, Exhibit D-1 of appellant's Jurisdictional Statement Appendix (hereinafter cited "Appellant's Appendix"). The copy in appellant's exhibit does not show the filing date stamp. The February 16th filing date is reflected in the Court of Appeals' Decision of December 22, 1978, Appellant's Appendix, C-1.

2. Rule 58, Ohio Rules of Civil Procedure, provides that judgments shall be signed by the court, entered by the clerk, and are effective when filed with the clerk for journalization. There is no requirement that judgments be "set forth on a separate document," compare Rule 58, Federal Rules of Civil Procedure. A requirement that judgments be "specifically designated" as such was contained in Ohio Civil Rule 58 as originally adopted in 1970, but was deleted by amendment in 1971. A copy of the current version of the rule is set forth in the Appendix of this Motion.

the running of the thirty days' time to appeal, if the February 16th entry were taken as a judgment.[3]

Subsequently, and more than thirty days after February 16th, the trial court entered findings of fact and conclusions of law with respect to its ruling on the motion for summary judgment,[4] and overruled appellant's motion for rehearing.[5] Appellant then gave notice of appeal to the Court of Appeals for Lucas County, Ohio.

2. Proceedings in the State Court of Appeals

After the parties had briefed the merits and prior to scheduled oral argument, the court of appeals acted *sua sponte* to dismiss the appeal for lack of jurisdiction, on the ground that the February 16th entry was a judgment, and that the notice of appeal was not timely filed as required by Ohio Appellate Rule 4(A).[6]

Appellant then moved for reconsideration, contending that the court of appeals had mistakenly applied Rule 4(A) with reference to the facts of the case, and that in ruling *sua sponte* the court had denied rights of due process and equal protection guaranteed by the Ohio and United States constitutions.[7] But appellant did not complain to the court of appeals that Rule 4(A) was itself unconstitutional, or otherwise invalid.

3. See Rule 4(A), Ohio Rules of Appellate Procedure, Appellant's Appendix, G-1, *Bond & Associates v. Airway Development Corp.*, 54 Ohio St. 2d 363, 377 N.E.2d 988 (1978).

4. Order of the Court of Common Pleas filed April 17, 1978, Appellant's Appendix, D-8.

5. Order of the Court of Common Pleas filed April 17, 1978, Appellant's Appendix, D-12.

6. Court of Appeals Decision, December 22, 1978, Appellant's Appendix, C-1.

7. Appellant's Request for Reconsideration, filed January 3, 1979, Jurisdictional Statement, 11, 19.

3. Proceedings in the Supreme Court of Ohio

Appellant then gave notice of appeal to the Supreme Court of Ohio. The civil jurisdiction of that court is limited to cases involving constitutional questions, which are brought up on appeal, and to cases of public or great general interest, brought up by motion to certify the record.[8] These jurisdictional matters are addressed first, before the court proceeds to any hearing of the merits.[9] In this case the Supreme Court of Ohio ruled both to dismiss the appeal for lack of a substantial constitutional question,[10] and to overrule the motion to certify.[11]

4. Proceedings in This Court

Appellant has given notice of appeal to this Court. His Jurisdictional Statement, including a motion for summary reversal, was submitted for filing by typewritten papers on August 7, 1979. On August 29, 1979, appellant submitted his Jurisdictional Statement in papers accepted for filing, not containing any motion for summary reversal. We assume that such motion is not now before the Court, if it ever was.

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8. Constitution of the State of Ohio, Art. IV, §2.

9. Rules of Practice, Supreme Court of Ohio, Rule II.

10. Order of the Supreme Court of Ohio, April 12, 1979, Appellant's Appendix, B-1.

11. The motion to certify was overruled by Order entered the same day, April 12, 1979. The Order is omitted from Appellant's Appendix.

ARGUMENT

APPELLANT'S CLAIMED FEDERAL QUESTIONS WERE NOT TIMELY OR PROPERLY RAISED BELOW, AND ARE NOT SUBSTANTIAL. THE JUDGMENT APPEALED FROM RESTS ON ADEQUATE STATE GROUNDS.

Final judgments rendered by the highest court of a state may be reviewed by this Court:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity," 28 U.S.C. §1257.

The only state "statute" of which appellant has complained in his Jurisdictional Statement is the Ohio Rules of Appellate Procedure,[12] and specifically Rule 4(A). But the validity of Rule 4(A) was not drawn in question before the state court of appeals, where appellant's only claim of constitutional violation was in respect to that court's acting *sua sponte* to raise the question of Rule 4(A)'s applicability.[13] Appellant did present to the Ohio Supreme Court a claim that the Ohio Rules of Appellate Procedure were unconstitutionally vague, citing the Fourteenth Amendment.[14] But this claim was not properly

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12. We assume, arguendo, that the Rules are a "statute" within the meaning of 28 U.S.C. §1257, see *John P. King Mfg. Co. v. City of Augusta*, 277 U.S. 100, 104 (1928); *cf. Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971).

13. Appellant's Request for Reconsideration, filed January 3, 1979, Jurisdictional Statement, 11, 19.

14. Appellant's "Memorandum in Support of the Appeal," filed in the Supreme Court of Ohio February 2, 1979, Jurisdictional Statement, 12.

presented, since the Ohio Supreme Court does not pass on issues not raised below, *Village of Clarington v. Althar*, 122 Ohio St. 608, 174 N.E. 251 (1930); *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, 213 N.E.2d 179 (1965); see *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978).

The Ohio Rules of Appellate Procedure were patterned after the Federal Rules of Appellate Procedure adopted by this Court in 1967, 389 U.S. 1065. Ohio Appellate Rule 4(A) is substantially the same as Federal Appellate Rule 4(a), in the respect of which appellant complains. Neither rule undertakes to say what constitutes a judgment: each simply limits time for filing notice of appeal - "thirty days from the date of the entry of the judgment or order appealed from." In Ohio, as in the federal system, other sources of law give definition to what is effectively a "judgment" for purposes of applying the limitation, see, e.g., *Millies v. Millies*, 47 Ohio St. 2d 43, 350 N.E.2d 675 (1976); *United States v. 1,431.80 Acres of Land*, 466 F.2d 820 (8th Cir., 1972). Judicial construction of the Rule "destroys the contention that it is too vague and indefinite to constitute valid legislation," *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274 (1940). Thus, even if the contention appellant here makes in respect to Rule 4(A) had been timely and properly raised, and expressly rejected by the courts below, it would not present a substantial Fourteenth Amendment question.

Appellant makes other federal constitutional claims, not involving the validity of any state court rule or state statute. He complains that the state court of appeals' dismissal *sua sponte* for lack of jurisdiction, where that issue had not been raised by the opposing side "and appellant was not otherwise afforded the opportunity to present argument against such dismissal," was a denial of "proce-

dural due process" guaranteed by the Fourteenth Amendment.[15] But in fact appellant *was* afforded an opportunity to argue against the dismissal by the appellate court's procedure upon motion for rehearing, a procedure which appellant invoked.

Again, appellant would attack on Fourteenth Amendment grounds the state court of appeals' refusal to recognize the trial court's orders subsequent to the February 16th entry—orders by which the trial court entered findings and conclusions and overruled appellant's motion for rehearing—as being the true "judgment" for purposes of the running of time to appeal.[16] But this is a question of state law, and the mere contention that it was wrongly decided does not give rise to an issue under the Fourteenth Amendment, *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

Finally, appellant would complain here of errors by the trial court in granting summary judgment, an action which necessarily concluded the case without jury trial.[17] That complaint was not passed upon by either of the state appellate courts, and it is not properly before this Court.

Rule 16(b) of the Court's Rules of Practice provides as follows:

> "(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it

---

15. Proposition II of appellant's "Questions Presented," Jurisdictional Statement, 6.

16. Proposition IV of appellant's "Questions Presented," Jurisdictional Statement, 7.

17. Proposition III of appellant's "Questions Presented," Jurisdictional Statement, 6.

does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

Each of these grounds is present here.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

JOHN G. MATTIMOE
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APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 58

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.